IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.11.2023

PRONOUNCED ON : 04.01.2024

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.No.39 of 2017
and
C.M.P.No.638 of 2017
and C.M.P.No.5625 of 2023

Vijay Anand ... Appellant

Vs

Kamala ... Defendant

Prayer in S.A.No.39 of 2017:- Second Appeal is filed under Section 100 of Civil Procedure Code, praying to set aside the judgement and the decree dated 29.10.2015 in A.S.No.43 of 2015 on the file of the Third Additional District Court, Salem, confirming the judgement and the decree dated 07.03.2014 in O.S.No.332 of 2012 before the First Additional Sub Court, Salem.

Prayer in C.M.P.No.5625 of 2023:- Civil Miscellaneous Petition is filed under Order 41 Rule 27 of Civil Procedure Code, praying to receive the documents listed in the petition hereto as additional evidence in the above second appeal.

List of Documents

Sl.No.	Date	Description	Remarks
1	20.02.2008	Registered Sale agreement executed among Kamala, Saradha and Vijay Anand	Original
2		Petition and orders in R.E.P.No.105 of 2008 in O.S.No.392 of 1997 on the file of the Additional District Munsif, Salem	Certified copy
3	15.04.2011	Possession delivery receipt	Certified copy

For Appellant : Mrs.Hema Sampath
Senior Advocate
for M/s.R.Meenal

For Respondent : Mr.V.Raghavachari
Senior Advocate
for M/s.S.Srinivasan Narayanan

J U D G M E N T

The unsuccessful plaintiff in a suit for specific performance is the appellant. The suit as well as first appeal filed by him were dismissed. Hence, he is before this Court.

Plaint Averments:-

2 (i) It is the case of the appellant/plaintiff that he entered into a Suit Sale Agreement with respondent and her sister-Saradha on 13.02.2008. The agreed sale consideration was Rs.13,750/- per cent. The extent of the property agreed to be conveyed under the agreement was 80 and 1/2 cents. Thus, the total agreed sale consideration would be Rs.11,06,875/-. On the date of agreement itself, the appellant paid a sum of Rs.3,25,000/- to the respondent and said Saradha. The balance sale consideration was agreed to be paid within a period of six months. It was averred by the appellant that though time was specified in the Suit Sale Agreement, it was not treated as essence of contract. At the time of agreement, the agreement vendors were not in physical possession of the suit property and execution petition filed by him for taking delivery of the agreement mentioned property was pending. Therefore, it was specifically recited in the agreement that time shall stand extended till possession was taken.

2 (ii) It was further averred by the appellant that the respondent and her sister had received a further sum of Rs.50,000/- and Rs.25,000/- on later dates and made endorsement in the Suit Sale Agreement. It was also claimed that the respondent herself received a sum of Rs.10,000/- on 30.04.2008, Rs.30,000/- on 17.09.2008, Rs.20,000/- on 30.03.2009, again Rs.20,000/- on 17.11.2009, Rs.5,000/- on 16.02.2010, Rs.10,000/- on 26.04.2010, Rs.15,000/- on 26.06.2010, Rs.10,000/- on 09.10.2010, Rs.21,000/- on 27.01.2011 and Rs.50,000/- on 18.04.2011 from the appellant/plaintiff and made endorsements on the Suit Sale Agreement. Thus, the respondent alone had received a further sum of Rs.1,91,000/- under the endorsements referred above. It was claimed by the appellant that in the initial advance amount paid on the date of agreement and the further amounts paid based on joint endorsement of respondent and her sister, the respondent's half share would be Rs.2,15,000/- and she herself received a sum of Rs.1,91,000/- on various subsequent dates under the endorsements. Therefore, totally the respondent received a sum of Rs.4,06,000/- from the appellant.

2 (iii) It was also contended that the respondent and her sister Saradha had taken possession of the agreement mentioned property through Court during April-2011. Thereafter, the respondent's sister Saradha executed a Sale Deed after receiving balance of sale price as per the Suit Sale Agreement. However, the defendant postponed the execution of the Sale Deed as per the agreement under some pretext or other. In these circumstances, on 11.04.2012, the respondent issued a legal notice with false allegations. Immediately, the appellant issued a reply notice on 23.04.2012 calling upon the respondent to be present before the Sub Registrar's Office, Suramangalam on 04.05.2012 for receiving balance sale price and execution of regular Sale Deed. Though the appellant was waiting in Sub Registrar's Office on 04.05.2012, the respondent failed to appear before the Sub Registrar's Office, Suramangalam. Hence, the appellant on the very same day, issued a telegram to the respondent stating the above mentioned facts. Since the respondent evaded performance of her part of the contract, the appellant had no other option except to approach the Court for specific performance.

2 (iv) The appellant also claimed that out of total consideration of Rs.11,06,875/-, the respondent's share would be Rs.5,53,437.50/- (Rounded to Rs.5,53,450/-). The respondent already received a sum of Rs.4,06,000/- and hence, the appellant was liable to pay only a sum of Rs.1,47,450/- and he was ready and willing to pay the balance sale consideration and get the sale deed executed. On these pleadings, the appellant sought for specific performance of the agreement dated 13.02.2008.

Averments found in the Written Statement of the Respondent/Defendant:-

3 (i) The respondent filed a written statement and averred that subsequent to Suit Sale Agreement dated 13.02.2008, the appellant, respondent and Saradha entered into registered Sale Agreement on 20.02.2008 on new terms mentioned thereon. Since the parties entered into a subsequent registered Sale Agreement, the new agreement substituted the old one by Principles of Novation. Therefore, the suit filed by the appellant based on old agreement, which was substituted by a new registered Sale

Agreement was not at all maintainable and barred under Section 62 of the Contract Act, 1872.

3 (ii) It was further contended by the respondent that as per the registered Sale Agreement between the parties dated 20.02.2008, the time stipulated for performance was six months and the said period expired on 20.08.2008. Therefore, the limitation for filing the suit expired on 20.08.2011 and in such circumstances, the present suit filed by appellant on 04.06.2012 was barred by limitation. It was also averred by the respondent that plaintiff had not come to the Court with clean hands and hence, the discretionary relief of specific performance could not be granted in his favour.

Evidence Before the Trial Court:-

4. Before the Trial Court, the appellant was examined as PW.1 and 15 documents were marked on his side as Exs.A1 to A15. On behalf of the

respondent, she was examined as DW.1 and 3 documents were marked on behalf of the respondent as Exs.B1 to B3.

Findings of the Trial Court:-

5. The Trial Court on appreciation of oral and documentary evidence available on record, came to the conclusion that as parties entered into a new registered agreement subsequent to the Suit Agreement, the present suit was barred by Principles of Novation. The Trial Court also rendered a finding that appellant did not approach the Court with clean hands, as he failed to mention about the existence of new registered agreement. In view of the same, the Trial Court refused to grant specific performance and dismissed the suit. Aggrieved by the same, the appellant preferred an appeal in A.S.No.43 of 2015 on the file of III Additional District Judge, Salem. The First Appellate Court also concurred with the findings of the Trial Court that suit was barred by Pinciples of Novation. The First Appellate Court also found that the suit was filed beyond the period of three years from date fixed for performance and hence, the same is barred by limitation. The First

Appellate Court also rendered a finding that the appellant failed to prove his readiness and willingness and hence, he was not entitled to equitable relief of specific performance. Therefore, the appeal filed by appellant was dismissed by the First Appellate Court. Aggrieved by the same, the appellant is before this Court.

Substantial Questions of Law Framed:-

6. At the time of admission, this Court formulated the following two substantial questions of laws by order dated 23.01.2017:-

> "*1. Whether in law the Courts are right in holding that the suit was barred by limitation when the respondent had received portions of the sale consideration, the last of which was on 18.04.2011 and the suit was filed on 04.06.2012?*
>
> *2. Whether in law the Courts below were right in holding that there was novation of contract and that the suit filed on Ex.A.1 agreement was bad when the necessary ingredients set out in Sec.62 of the Indian Contracts Act were not satisfied?*"

7. Heard the arguments of Mrs.Hema Sampath, learned Senior Counsel for appellant and Mr.V.Raghavachari, learned Senior Counsel for respondent. The typed set and other records perused along with petition to raise additional evidence.

Submissions of the Learned Senior Counsel appearing for the Appellant/Plaintiff:-

8. Mrs.Hema Sampath, learned Senior Counsel appearing for the appellant submitted that the readiness and willingness on the part of the appellant was not at all denied in the written statement inspite of specific pleading in the plaint explaining the readiness and willingness of the appellant and therefore, in the light of the evidence let in by the appellant, the First Appellate Court ought not to have rendered a finding that appellant failed to prove his readiness and willingness. The learned Senior Counsel further submitted that respondent even in her proof affidavit admitted that appellant helped her in pursuing execution proceedings and taking delivery.

The respondent had taken delivery of the property through Court only during April-2011 and thereafter, turned around and refused to execute Sale Agreement. In these circumstances, the readiness and willingness on the part of the appellant is properly proved. The learned Senior Counsel further submitted that in view of the specific recital in the agreement that time could be extended till taking of possession by the respondent through Court, the limitation for filing specific performance suit would start only from April-2011 not from the expiry of six months period mentioned in the agreement. The learned Senior Counsel further submitted that the xerox copy of Ex.A1, Suit Sale Agreement was marked through cross examination of PW.1 as Ex.B2. In Ex.B2-Sale Agreement, an additional page No.5 was inserted by the respondent as if, it was part of Ex.A1-Suit Sale Agreement. The learned Senior Counsel by taking this Court to the documents filed along with petition to raise additional evidence in C.M.P.No.5625 of 2023 submitted that the 5th page inserted in Ex.B2 is a page xeroxed from original registered Sale Agreement entered between the parties on 20.02.2008. The learned Senior Counsel further submitted that while marking xerox copy of

Suit Sale Agreement, the same was manipulated by the respondent by inserting a page copied from registered agreement dated 20.02.2008 and the same was not noted by the appellant at the time of cross examination. The learned Senior Counsel further submitted that regarding the availability of 5th page in Ex.B2, the respondent's counsel did not cross examine the appellant/plaintiff and hence, the 5th page was not at all brought to notice of the appellant, when he was in witness box. The learned Senior Counsel also submitted that the manipulation by the respondent came to appellant's knowledge only when it was informed by his counsel in second appeal that 5th page was not part of original Suit Sale Agreement, but it was a sheet taken from Ex.B1. Hence, as per the advice tendered to the appellant, an application has been filed to receive three additional documents namely (a) registered Sale Agreement executed between the parties dated 20.02.2008, (b) the petition and orders in R.E.P.No.105 of 2008 and (c) delivery of possession receipt dated 15.04.2011. The learned Senior Counsel further submitted that additional documents sought to be produced by the appellant are all vital documents to prove the manipulation by the respondent and hence, the civil miscellaneous petition shall be allowed. In support of her contention, the learned Senior Counsel relied on the following judgements:-

(i) ***A.V.Papayya Sastry vs. Govt. of A.P.,*** reported in ***(2007) 4 SCC 221***.

(ii) ***Ram Chandra Singh vs. Savitri Devi*** reported in ***(2003) 8 SCC 319***.

(iii) ***Sekar vs. Arthanari*** (judgement of this Court in Review Application No.33 of 2010 dated 17.08.2022)

(iv) ***Zarina Siddiqui vs. A.Ramalingam*** reported in ***(2015) 1 SCC 705***.

(v) ***Lata Constructions and others vs. Dr.Rameshchandra Ramaniklal Shah*** reported in ***(2001) 1 SCC 586***.

(vi) ***Godan Namboothiripad vs. Kerala Financial Corporation, Vellayambalam and others*** reported in ***1997 SCC Ker 140 : AIR 1998 Ker 31***.

(vii) ***Union of India vs. Ibrahim Uddin and another*** reported in ***(2012) 8 SCC 148***.

Submissions of the Learned Senior Counsel appearing for the Respondent/Defendant:-

9. Mr.V.Raghavachari, learned Senior Counsel appearing for the respondent submitted that the subsequent registered Sale Agreement entered into between the parties was suppressed by the appellant in her plaint pleadings and therefore, the appellant has not approached the Court with clean hands. In such circumstances, the appellant is not entitled to discretionary relief of specific performance. The learned Senior Counsel also submitted that the other party to agreement namely Saradha executed a Sale Deed in pursuance of the registered Sale Agreement entered between the parties and the same had been marked as Ex.B3. The learned Senior Counsel further submitted that if the Suit Sale Agreement was not superseded by registered Sale Agreement absolutely there was no necessity for Saradha to execute a Sale Deed in pursuance of registered Sale Agreement between the parties without referring the Suit Sale Agreement. Therefore, the learned Senior Counsel submitted that Suit Sale Agreement

was superseded by subsequent registered Sale Agreement between the parties and hence, the Courts below are justified in dismissing the suit on the Principle of Novation of contract. The learned Senior Counsel further submitted that as per the terms of contract, the period fixed for performance was six months and the suit has been filed beyond the period of three years from the date of expiry of the period fixed for performance and hence, both the Courts below rightly held the suit was barred by limitation.

Discussion on First Question of Law:-

10. As per the terms of Suit Sale Agreement, the time fixed for performance was six months. However, there is a recital in the Suit Sale Agreement that at the time of entering into agreement, the agreement vendors namely respondent and Saradha were not in physical possession of agreement mentioned property and time for performance could be extended till agreement vendors take possession through Court. It is seen from the plaint averment which was not controverted in the written statement that the agreement mentioned property was taken possession by respondent through

Court only during April-2011. Therefore, the time for performance could be extended till April-2011 as per the recital found in the agreement. In such case, the suit has been filed on 04.06.2012 well within three years from the date of expiry of time prescribed for performance of agreement under the recitals therein. Hence, the findings rendered by the Courts below as if, the suit was barred by limitation is liable to be set aside and the question of law is answered accordingly in favour of the appellant and against the respondent.

Discussion on Second Question of Law:-

11. The appellant herein filed a suit for specific performance of the unregistered Sale Agreement dated 13.02.2008. However, the same was resisted by the respondent by contending that subsequent to unregistered Sale Agreement dated 13.02.2008, there was a registered Sale Agreement between the parties on 20.02.20008 regarding the very same property on different terms. Therefore, the subsequent registered Sale Agreement superseded to the earlier one and consequently, as per the principles of

novation of contract, the earlier agreement/suit agreement cannot be specifically performed. The appellant, who seeks specific performance of the agreement, not even referred to the subsequent registered Sale Agreement between the parties on different terms.

12. It is settled law the relief of specific performance is a discretionary one and guided by equity. Therefore, the person, who seeks equitable remedy of specific performance must come to the Court with clean hands by putting forth all real facts. The appellant herein suppressed the 2nd registered agreement between the parties. In this regard, it would be appropriate to refer to the decision of the Hon'ble Apex Court in ***Zarina Siddiqui vs. A.Ramalingam*** reported in ***(2015) 1 SCC 705,*** the relevant observation of the Hon'ble Apex Court reads as follows:-

> *"33. The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the plaintiff so that discretion would be exercised judiciously in favour of the plaintiff. At the same*

time, if the defendant does not come with clean hands and suppresses material facts and evidence and misleads the court then such discretion should not be exercised by refusing to grant specific performance.

34. In the instant case, as noticed above, although Defendant 2 held a registered power of attorney on behalf of Defendant 1 to sell and dispose of the property, but the defendants not only made a false statement on affidavit that the power of attorney had authorized the second defendant only to look after and manage the property but also withheld the said power of attorney from the Court in order to misguide the Court from truth of the facts. Further, by registered agreement the defendants agreed to sell the suit premises after receiving advance consideration but they denied the existence of the agreement in their pleading. Such conduct of the defendants in our opinion, disentitles them to ask the court for exercising discretion in their favour by refusing to grant a decree for specific performance. Further, if a party to a lis does not disclose all material facts truly and fairly but states them in distorted manner and misleads the court, the court has inherent power to exercise its discretionary jurisdiction in order to prevent abuse of the process of law.”

13. Though the above said case law was cited by the learned Senior Counsel for the appellant to contend that the discretion has to be exercised against the respondent, who introduced a manipulated document under Ex.B2 and attempted to mislead the Court, the observation made by the Hon'ble Apex Court with regard to the conduct of the party and duty of the litigant to disclose all material facts truly and fairly is equally applicable to the appellant/plaintiff also. In fact, the appellant being a plaintiff in a suit for specific performance has more duty and obligation to disclose true facts in his averments and he cannot take advantage of questionable conduct on the part of the defendant, if any. In the case on hand, the appellant, who suppressed the 2nd registered agreement between the parties. The 2nd agreement is between the very same parties in respect of very same subject matter only the terms of the agreement varies with each and other. Under Ex.A1, unregistered Suit Sale Agreement, the agreed sale consideration was Rs.11,06,875/- at the rate of Rs.13,750/- per cent. Under Ex.B1-registered Sale Agreement dated 20.02.2008, the agreed sale consideration was Rs.1,77,100/-. The time fixed for performance in both the contracts were six

months. Under the earlier Suit Sale Agreement, a sum of Rs.3,25,000/- was paid as advance and under the subsequent registered agreement, a sum of Rs.50,000/- said to have been paid. Therefore, the point of different between these two agreements lies only in sale consideration and the advance amount paid. The two agreements are not inconsistent with each other. Therefore, we can safely come to the conclusion that subsequent to the Suit Sale Agreement, parties entered into a fresh registered agreement by substituting the original terms with regard to the sale consideration. The learned Senior Counsel for the appellant by taking this Court to the oral testimony of PW.1 tried to submit that 2nd registered Sale Agreement was entered into just to create an encumbrance in the property so as to prevent one Rajendran from encumbering the property. However, the plaintiff failed to examine any independent witnesses, to explain the reason for entering into 2nd registered Sale Agreement. Except some explanation by PW.1, who is interested witness, there is no evidence available on record to give plausible explanation to enter into 2nd agreement. In such circumstances, the version of PW.1 as if, 2nd agreement was entered into just to create encumbrance in the suit property and the same was not intended to be acted upon is not acceptable to this Court.

14. It is also pertinent to mention after respondent and her sister had taken delivery of the agreement mentioned property through Court during April-2011, the respondent's sister Saradha executed a pacca Sale Deed in favour of the appellant/plaintiff in pursuance of registered 2nd agreement dated 20.02.2008. The said Sale Deed executed by Saradha was marked as Ex.B3 by the respondent. A perusal of the same would clearly establish that the registered Sale Agreement between the parties dated 20.02.2008 was acted upon and in pursuance of the same respondent's sister executed her half share in favour of appellant/plaintiff. The appellant for the reason best known to him, suppressed not only registered Sale Agreement Ex.B1 and also the material fact that Ex.B3-Sale Deed was executed by Saradha in pursuance of registered Sale Agreement Ex.B1. A perusal of Ex.B3-Sale Deed executed by Saradha would clearly establish that there was no reference about the Suit Sale Agreement in that Sale Deed. However, the

appellant/plaintiff made a false averment in the plaint as if, the said Saradha executed Sale Deed in favour of appellant in pursuance of the Suit Sale Agreement. In Paragraphs VII and VIII of the plaint, it is averred as follows:-

"*VII. It is humbly submitted that only during the month of April 2011, the delivery of property was effected and the said R.E.P.No.105/2008 was terminated. It is humbly submitted that even after that the plaintiff has been requesting the defendant and the said Mrs.Saradha to execute the sale deed at his cost after receiving the balance of sale price of as per suit sale agreement. It is humbly submitted that though the said Mrs.Saradha was willing to execute the sale deed to the plaintiff, the defendant herein had been postponing the execution of the sale deed on some pretext or other and she was adopting all the possible methods to avoid executing the document.*

VIII. It is humbly submitted that as the defendant had not co-operated with the said Mrs. Saradha, on 21.11.2011, the said Mrs.Saradha had received her part of the sale *consideration from the plaintiff and executed a registered sale deed in respect of her half share in favour of the plaintiff."*

15. The averment in the plaint as if, Saradha executed Sale Deed in respect of her half share in pursuance of Suit Sale Agreement got falsified by production of Ex.B3-Sale Deed executed by her. The same had been executed in pursuance of registered 2nd agreement and not in pursuance of Suit Sale Agreement. Therefore, there is ample evidence available on record to show that the 2nd registered Sale Agreement had been acted upon by the appellant/plaintiff. However, the same has been deliberately suppressed by the plaintiff. Therefore, this Court has no hesitation in holding the appellant has not come to the Court with clean hands by putting forth the true facts.

16. The learned Senior Counsel for the appellant by taking this Court to the notice issued by the respondent under Ex.A2 submitted that the respondent herself only wanted completion of sale transaction in pursuance of Suit Sale Agreement and therefore, the 2nd Sale Agreement can be

ignored. As pointed out earlier, both the Suit Sale Agreement and 2nd registered Sale Agreement are between the appellant on one hand and the respondent and her sister Saradha on the other hand. Regarding her half share, said Saradha already executed a pucca Sale Deed in pursuance of the 2nd registered Sale Agreement dated 20.02.2008 and the Sale Deed has been marked as Ex.B3. When half of the property is already purchased by the appellant from said Saradha on the terms settled by the 2nd agreement, it would not be appropriate to say that in respect of other half of the property, the earlier Sale Agreement still holds good notwithstanding execution of Sale Deed by Saradha as per the 2nd agreement in respect of her half share. Therefore, the appellant cannot take advantage of the notice issued by the respondent under Ex.A2. In view of the discussions made earlier, this Court concurs with the findings of the Trial Court that the 2nd registered Sale Agreement entered between the parties superseded the earlier Suit Sale Agreement and hence, the Courts below are justified in holding that the suit is barred by principle of novation of contract. The second question of law is answered accordingly against the appellant and in favour of the respondent.

17. Even otherwise, as discussed earlier, the appellant/plaintiff is guilty of suppression of material fact namely,

(a) He failed to disclose the 2nd registered Sale Agreement entered between the parties dated 20.02.2008 in his plaint.

(b) He deliberately made a false averments in the plaint as if, Sale Deed was executed by Saradha as per the terms of the earlier Sale Agreement at his request. Thus, the execution of Ex.B3 Sale Deed by Saradha as per the terms of 2nd registered Sale Agreement has been suppressed and an attempt was made to mislead the Court.

18. It is settled law a person, who approaches the Court with tainted hands is not entitled to equitable remedy of specific performance. The appellant is guilty of suppression of material fact and having failed to approach the Court with clean hands, the appellant is not entitled to equitable remedy of specific performance. The Courts below rightly came to the conclusion that appellant has not approached the Court with clean hands and as a consequence, not entitled to remedy of specific performance.

19. Further, even as per the averment of the appellant in his plaint, the respondent and her sister Saradha had taken possession of the agreement mentioned property during April-2011. As per the recital found in the Suit Sale Agreement, time stipulated for agreement is extendable upto the time of taking delivery. The other co-owner of the agreement mentioned property namely Saradha executed Sale Deed in favour of the appellant/plaintiff as early as 21.11.2011. It is the case of the appellant that respondent failed to co-operate with Saradha for execution of Sale Deed. Therefore, Saradha separately executed a Sale Deed in respect of her half share. In that case, the appellant should have taken steps to specifically enforce the agreement against the respondent immediately. The sequence of facts in this case establish the first notice was issued by respondent on 11.04.2012, then only appellant issued a reply notice on 23.04.2012 seeking performance of the agreement. Therefore, there is no explanation on the part of the appellant why he failed to seek specific performance from April-2011 to April-2012 nearly for one year. Atleast when non-cooperation of the respondent is established by execution of Sale Deed by Saradha in respect of her half

share, the appellant should have approached the Court immediately. His failure to take any steps for performance till notice by respondent clearly creates a serious doubt about his continuous readiness and willingness to perform his part of the contract. Therefore, the appellant also failed to prove his continuous readiness and willingness so as to claim specific performance of the agreement. Therefore, the judgement and decree passed by the Courts below dismissing the suit filed by him deserves to be confirmed. In the light of above discussion, the case laws cited by learned Senior Counsel for appellant, with regard to employment of fraud, in 2007 (4) SCC 221, 2003 (8) SCC 319 and Review Application No.33 of 2010, are not applicable to facts of the case especially when Ex.B2 was admitted by PW.1 in his cross examination as if, it was handed over to respondent by him. The decision in 2001 (1) SCC P.586 and 1997 SCC (Ker) 140 are also not applicable to the facts of the case in view of the fact subsequent to execution of 2nd registered agreement the same has been acted upon in the present case in the form of sale deed by Saradha in favour of appellant under Ex.B3.

20. In view of my answer to the 2nd question of law and the other reasonings regarding the failure of the appellant to approach the Court with clean hands and lack of evidence for his continuous readiness and willingness, the Second Appeal stands dismissed.

<u>Discussion on Petition to raise Additional Evidence</u>:-

21. The appellant herein has filed an application to raise additional evidence. Along with application, he filed following three documents:-

(i) Registered Sale Agreement between the parties dated 20.02.2008.

(ii) Petition and Orders in R.E.P.No.105 of 2008.

(iii) Delivery account in R.E.P.No.105 of 2008.

As far as Documents Nos.2 and 3 are concerned, those documents are relating to the EP proceedings through which the possession of the agreement mentioned property was taken by the respondent and Saradha. Those documents came into existence well prior to filing of the suit. In fact, the appellant referred to taking of possession by the respondent through

Court in April-2011 in his plaint averment with EP number. However, the appellant failed to produce those documents before the Trial Court for the reasons best known to him. In the affidavit filed in support of petition to raise additional evidence, the appellant has not given any convincing reason for his failure to produce the Documents Nos. 2 and 3 before the Trial Court at the time of trial. The essential ingredients of Order 41 Rule 27 of Civil Procedure Code have not been satisfied as far as Documents Nos.2 and 3 are concerned and therefore, this Court conclude those two documents cannot be permitted to be received as additional evidence in second appeal.

22. As far as Document No.1 is concerned, it is original registered Sale Agreement entered between the parties dated 20.02.2008. The certified copy of the same has been marked as Ex.B1. The appellant wants to mark the original registered agreement only for the purpose of demonstrating that an endorsement made in the backside of 2nd page in the said document was xeroxed and inserted as Page No.5 in Ex.B2 clandestinely by the respondent. When Ex.B2 consisting 5 pages were shown to the appellant

while he was in witness box as PW.1, he admitted the same. Now, in the affidavit filed in support of the petition to raise additional evidence, it is stated by the appellant that during cross examination, he did not verify each and every page of the document and therefore, a manipulated document, which includes a newly inserted 5th page was allowed to be marked. It is also stated by him in his affidavit that the said manipulation came to his knowledge only when it was pointed out by his counsel in second appellate stage. It is pertinent to mention that availability of 5th page in Ex.B2 was very well pointed out by the Trial Court in its judgement. In fact the Trial Court observed that Ex.A1 got only 4 pages and its xerox copy Ex.B2 got 5 pages and the said discrepancy has not been clearly explained by the appellant. The said discrepancy was one of the factor which weighed with the Trial Court to dismiss the suit filed by the appellant. In that case, the appellant should have filed original registered agreement between the parties atleast before the First Appellate Court. For the reason best known to him, the appellant failed to produce the same as additional document before the First Appellate Court. The reason assigned by the appellant for his failure to produce the original registered Sale Agreement between the parties before two Courts below is not convincing and acceptable. Even assuming the first document sought to be produced by the appellant is received in evidence and marked as exhibit before this Court, still the appellant has to explain why he failed to make a reference about the registered agreement between the parties in the plaint averments. This Court already concluded that failure of the appellant to refer to the registered agreement would make him as a person approaching the Court with unclean hands and therefore, the receipt of first document relied on by the appellant as additional evidence would not have much impact on the final outcome of the second appeal. In such circumstances, this Court holds the Document No.1 will not be useful to this Court to dispose of the second appeal in a more satisfactory way and in the absence of any convincing reasons for failure of the appellant to produce the same before the Courts below, this Court is not inclined to accept the first document also. In view of the discussion made earlier, the petition to raise additional evidence is dismissed.

23. **In Nutshell**:-

(i) The Second Appeal is dismissed by confirming the judgement and decree passed by the Courts below.

(ii) In the facts and circumstances of the case, there shall be no order as to costs.

(iii) C.M.P.No.5625 of 2023 to raise additional evidence stands dismissed and other connected civil miscellaneous petition is closed.

04.01.2024

Index : Yes
Speaking order : Yes
Neutral Citation : Yes
dm

To

1.The Third Additional District Court,
Salem.

2.The First Additional Sub Court,
Salem.

S.SOUNTHAR, J.

dm

Pre-delivery judgement in S.A.No.39 of 2017

04.01.2024